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July 9, 1997

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

EX PARTE

VIA HAND DELIVERY

William F. Caton, Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

**Re: Notification of Permitted *Ex Parte* Communications—Closed Captioning and
Video Description of Video Programming Notice of Proposed Rulemaking MM
Docket No. 95-176**

Dear Mr. Caton:

Pursuant to Sections 1.1206(b)(1) and (b)(2) of the Commission's Rules, Cole, Raywid & Braverman, on behalf of Outdoor Life Network, Speedvision Network, BET On Jazz, The Golf Channel and America's Health Network (collectively, "Networks"), hereby submits an original and one copy of this letter memorializing a permitted *ex parte* presentation in the referenced proceeding.

On Tuesday, July 8, 1997, Fred Epstien of Outdoor Life and Speedvision Networks, Ibn Spicer of BET On Jazz, Brian Hansen of America's Health Network, and Burt Braverman and James Tomlinson of Cole, Raywid & Braverman, met with Commissioner Chong, Suzanne Toller and Greg Parisi to discuss the issue of library programming and the Networks' proposed

July 9, 1997

Page -2-

exemption for low-penetrated national basic cable networks. Also attached are two copies of a written *ex parte* communication provided to Commissioner Chong, Ms. Toller and Mr. Parisi in this meeting. See Attachment A.

Low-Penetrated Network Exemption

The Networks emphasized that the multi-channel programming marketplace is highly competitive and is characterized by substantial barriers to entry for new programming networks. New networks must provide aggressive launch packages (*e.g.*, multiple years of free service) to gain carriage on channel-locked cable systems and, consequently, have very limited affiliation fee revenues during early years. Moreover, advertising revenues are also minuscule during early years because few national advertisers place significant advertising on cable networks until they reach at least 10 million, and in most cases at least 15 or 20 million, subscribers. As a result, it is generally impossible for a new network to achieve *break-even* until it reaches at least 20 million subscribers, which typically takes at least five years.

The Networks stressed that they face a number of regulatory, economic and technical obstacles. The channel scarcity that hinders new networks' growth has been exacerbated by recent developments, such as must-carry, rate regulation and leased access. Moreover, cable operators' depressed equity values have forced delay of planned system rebuilds, expansion and digital rollout.

The Networks stated their view that a captioning requirements will have a substantial and disproportionately adverse impact on new programming networks. The actual burden of complying with the captioning requirements will fall on programming networks, as new networks are not able to pass these costs to MVPDs or subscribers. If nothing is being charged by a new network for its programming, the price cannot be raised to cover new costs. Nor can new networks require program suppliers to absorb this cost: some are unwilling to undertake this responsibility, and others will simply raise their licensing prices.

Next, the Networks urged the Commission to avoid crafting rules that treat all video programming suppliers as equals, when in fact there are vast differences between low-penetrated cable networks and large broadcast and cable networks in size, viewership, advertising revenues, programming budgets, staffing and other distinguishing characteristics. In this regard, the Networks provided an analysis of the relative impact of captioning costs on various distributors of video programming. See Attachment A. This analysis demonstrates the disproportionate impact that a captioning mandate would impose on an emerging cable network relative to either an established cable network or a broadcast network.

July 9, 1997

Page -3-

The Networks discussed the fact that they and other new programming networks cannot shoulder the substantial additional expense associated with captioning. Even when phased-in under the Commission's proposed quotas during the transition period, the costs are daunting. For example, America's Health Network's cost of captioning over the proposed eight-year transition period would be \$21 million, an amount in excess of its programming budget for an entire year. The Networks stated that they would have to absorb captioning costs. But because the Networks cannot simply raise their debt limit, expenditures for captioning must come out of current budget—thereby displacing other priority expenditures and leading to several destructive scenarios; *e.g.*, reduce either the *quality* of their programming, resulting in a diminished viewing experience for all viewers, or the *quantity* of programming they produce and acquire, requiring greater recycling of programs.

The Networks reiterated their position taken in Comments and in previous *ex parte* meetings that the Commission should exempt by regulation video programming distributed by low-penetrated national basic cable networks, *i.e.*, those that serve fewer than 20 million subscribers. The Networks stressed that this proposed exemption is limited in nature, and merely provides a temporary reprieve from captioning, which would apply only while a low-penetrated network establishes itself financially and in the marketplace. The exemption would have only a limited impact, as the larger non-exempt networks collectively serve 83 percent of all national basic cable subscribers nationwide, while networks that would be exempt serve only the remaining 17 percent of all subscribers.

The Networks emphasized that captioning is likely to increase on new networks even if their programming is exempted. New cable networks have a market-based incentive to attract the hearing-impaired. For example, America's Health Network has been exploring the feasibility of captioning certain portions of its programming that would be of particular interest to its hearing-impaired viewers.

Also discussed was the feasibility of other possible methods by which the Commission might exempt other classes of small and/or emerging distributors of video programming (*e.g.*, exemptions for those distributors with less than a specified amount of annual revenue or the imposition of a cap on the annual captioning expense that a network would incur, expressed as a percentage of revenue). The Networks expressed their view that an exemption based on financial data, while clearly preferable to *no* exemption, would be less preferred than their proposed exemption, and that a "one-size-fits-all" exemption based on financial data (*e.g.*, revenue) may be difficult to administer across the video programming industry—whether within the cable programming industry or among all other video distribution media (*e.g.*, broadcast TV or LPTV). The Networks suggested, as an alternative, that the Commission consider exempting until a small and/or new video programming distributor it becomes cash-flow positive.

July 9, 1997

Page -4-

Library Programming

The Networks stated that while their primary position is that the Commission should temporarily exempt them as a class because of their status as low-penetrated networks, they urged the Commission to consider that any mandate for the captioning of library programming to which they may be subject—either initially or after reaching the 20 million subscriber threshold—be reasonable, realistic and reflect the economic and competitive realities of the cable programming industry.

The Networks' expressed their concern that the Commission may be considering requiring the captioning of 75 percent of all library programming over a period of ten years. The Networks stated their view that this proposed recommendation (1) does not comport with the intent of Congress, (2) would have a disastrous financial impact on cable programming networks, and in particular newer networks, and (3) will not necessarily lead to the captioning of more library programming, but rather may lead programmers to avoid carriage of some of the most desirable and diverse library programming. The Networks urged the Commission, at least for the time-being, to allow market forces to determine the appropriate rate at which library programming will be captioned.

The Networks noted that because of the enormous cost of producing and acquiring new and original programming, cable networks, and new programming networks in particular, typically rely upon diverse library programming, especially during their formative years. For example, 70 percent of the programming distributed by Outdoor Life, and over 50 percent of the programming currently distributed by Speedvision, is library programming. Much of this programming, especially that produced prior to the mid-1980s, has never been captioned. The Networks expressed their belief that a captioning requirement would create a substantial burden on cable networks.

The Networks stated that if required to caption such library programming, they will be forced to forego much of this distinctive library material that they display—programming that is selected because it is attuned to the specialized viewing interests of their subscribers—in favor of more mundane programming that already has been captioned, at direct cost to the *diversity* of programming available to all subscribers, including the hearing-impaired. The Networks stated their view that video programming networks need flexibility in designing their programming schedules and that a captioning mandate for library programming would distort the program selection process. It would be unwise and unsound policy for the Commission to artificially disrupt the Networks' program selection process because of cost concerns resulting from mandatory captioning of library programming. The Networks noted that a requirement that networks caption substantial amounts of library programming resulting in reduced diversity of library programming is clearly *not* what Congress intended.

July 9, 1997

Page -5-

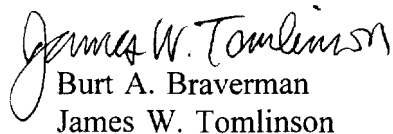
Proposals Regarding Library Programming

The Networks first recommended that the Commission adopt only voluntary guidelines, including specific goals and time tables, regarding the captioning of library programming, as contemplated by Congress and by the Commission in the NPRM. The Commission should then schedule a review following the end of the first new programming transition period (*e.g.*, two to four years after the adoption of captioning rules) to assess the progress that will occur in the captioning of both new and library programming. By proceeding in this manner, the Commission will be able to base any decision regarding library programming on information gathered in the context of a totality of captioned programming available to the hearing-impaired.

In the alternative, the Networks urged the Commission to adopt the proposal set forth by CBS, Inc. in its comments that all providers other than national broadcast networks be exempted from any requirement to caption library programming. However, should the Commission decline to adopt either of these alternatives, the Networks asked that the Commission adopt a proposal similar to that set forth by the Motion Picture Association of America: once a national basic cable network achieves a threshold of 20 million subscribers, it would be required to caption 50 percent of its library programming, phased in over a period of fifteen years.

If you need any additional information, please contact the undersigned.

Respectfully submitted,


Burt A. Braverman
James W. Tomlinson

cc: Commissioner Chong
Ms. Toller
Mr. Parisi

	Households Available	Household Rating	Households Viewing	CC cost per Hour	CC cost per HH
Broadcast Channel A	97,000,000	8.0	7,760,000	\$800	\$0.0001
Broadcast Channel B	80,000,000	2.0	1,600,000	\$800	\$0.0005
Established Cable Network A	65,000,000	0.9	585,000	\$800	\$0.0014
Established Cable Network B	20,000,000	0.4	80,000	\$800	\$0.0100
Emerging Cable Network A	19,000,000	0.3	57,000	\$800	\$0.0140
Emerging Cable Network B	6,000,000	0.1	6,000	\$800	\$0.1333

